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IN THE

Supreme Court of the United States

October Term, 1957-58

No. 119 MISC.

DONALD RICHARD RANDAZZO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California, or in the Alternative to the District Court of Appeal, District Two, Division One.

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Petition for a Writ of Certiorari to the Supreme Court of the State of California, or in the Alternative to the District Court of Appeal, District Two, Division One.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California, entered on the 30th day of April, 1957, or in the alternative, to the District Court of Appeal of the State of California, District Two, Division One, to review its order of June 10, 1957, reinstating its decision of March 29, 1955.

Citations to Opinions Below.

The original opinion of affirmance of conviction by the District Court of Appeal, District Two, Division One, printed in appendix, is reported in 132 Cal. App. 2d 20. The opinion of the District Court of Appeal granting the motion to recall the remittitur on the 11th day of July, 1956, printed in the appendix, appears and is reported in 143 Cal. App. 2d 59. The opinion of the District Court of Appeal, District Two, Division One, reversing the conviction after a call of remittitur as to Count II, printed in the appendix, is reported in 145 A. C. A. 135. The opinion of the Supreme Court of the State of California reversing the District Court of Appeal on the granting of its order to recall the remittitur, printed in the appendix, is reported in 48 A. C. 886. The order of the District Court of Appeal vacating its orders of October 16, 1956, and of July 11, 1956, is not reported.

Jurisdiction.

The decision of reversal of the District Court of Appeal was entered on the 16th day of October, 1956. The judgment and order of the Supreme Court of the State of California, was entered on the 30th day of April, 1957. The new judgment of the District Court of Appeal of the State of California, District Two, Division One, in conformity with the order in the Supreme Court decision, was entered on the 10th day of June, 1957. Jurisdiction of this court is invoked under 28 United States Code, Section 1257(3).

Statement of the Questions of the Case

(1) Whether it offends the due process clause of the Fourteenth Amendment of the Constitution of the United States for a person to be charged with the commission of an offense which in substantial part charges him with acts that are not then a crime, and to proceed to trial and have a jury instructed that those acts will sustain a guilty verdict. (2) Whether it offends the due process clause of the Fourteenth Amendment of the Constitution of the United States for him thereafter to have his case heard on appeal and to be affirmed under a mistaken concept of law, when the State, acting through its courts, declares that it affirmed the conviction under a misapprehension of the existing law and stated that the defendant was charged, tried and found guilty for acts which were not then a crime. And then to have his freedom denied him by a decision which purports to hold that the Court which made the error is powerless to correct that error.*

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*Additional questions reserved for briefing but not here stated are:

(1) Whether the Supreme Court's interpretation of the rules regarding the recall of the remittitur, as construed and applied in this case offends due process?

(2) Whether the Supreme Court's construction and interpretation of the rules regarding the recall of the remittitur violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as construed and applied in this case.

(3) Whether it violates the due process clause of the Constitution of the United States for a jury to be instructed that the commission of totally innocent acts would sustain a conviction, when the rule of the state is that a jury is presumed to follow all of the instructions.

How Federal Question Is Presented.

The Federal question was presented to the State Court, District Court of Appeal of the State of California, after judgment of affirmance of the conviction had been entered and the mandate issued, by a "petition to recall the remittitur." The District Court of Appeal granted the petition to recall the remittitur as to Count II and after a petition for a rehearing was denied and a petition for a hearing in the Supreme Court of the State of California was also denied, determined the question and decided the case on the merits. The District Court of Appeal then entered a new and different judgment reversing conviction theretofore affirmed as to Count II, as follows:

> "It appearing that the opinion of this Court, filed March 29, 1955, affirming a conviction of 'life imprisonment without possibility of parole,' for the crime of kidnapping 'with intent and for the purpose of committing robbery,' under Section 209 of the Penal Code, was erroneously predicated upon statute as it existed prior to 1951, and prior to defendant's alleged criminal acts, whereas, *such statute, as amended in 1951, does not make it an offense separate from robbery, to hold or detain a person for the purpose of committing robbery,* and the remittitur in said case having been recalled as to Count II by order of this Court filed on July 11, 1956, and the judgment as to Count II having been vacated by said order, and the matter now being submitted for decision, is hereby ordered, good cause appearing therefor, that the judgment appealed from, in respect to Count II, is hereby reversed." (Italics supplied.)

The Supreme Court of the State of California, after a petition for rehearing had been denied by the District Court of Appeal, granted a hearing upon the decision of the District Court of Appeal and reversed the District Court on the procedural issue that it was improper to grant the petition to recall the remittitur.

> "It follows from the foregoing that the District Court of Appeal should have vacated its order recalling the remittitur and not redecided the case on its merits. . . . Accordingly, the cause is transferred to the District Court of Appeal, Second Appellate District, Division One, with direction to file its order vacating its order recalling the remittitur and reissue the remittitur on its decision affirming the judgment."

Why the Application for a Writ of Certiorari Is Made in the Alternative.

As noted above, the ultimate order affirming the conviction and the opinion thereon, was entered by the District Court of Appeal, pursuant however to an order of the Supreme Court. In this posture of the case, petitioner is uncertain to which court the writ correctly issues.

Statutes and Constitution Involved.

(1) Section 209 of the Penal Code of the State of California, as it existed prior to 1951, printed in the Appendix.

(2) Section 209 of the Penal Code of the State of California, as amended in 1951, printed in the Appendix.

(3) The Fourteenth Amendment to the Constitution of the United States, printed in the Appendix.

Concise Statement of the Case.

The petitioner, an 18 year old youth, was tried in the month of December, 1953, under an information charging him in Count I, with robbery and in Count II, with a crime of kidnapping for the purpose of robbery in violation of Section 209 of the Penal Code of the State of California.

At the time the petitioner committed the acts which constituted the base of the crime alleged, it was no crime separate and distinct from the crime of robbery, to hold or detain a person for the purpose of robbery. These elements of the offense had been deleted from Section 209 of the Penal Code by act of Legislature in 1951.

Yet the charging words of Count II were as follows:

> "[Defendant did] seize, confine, abduct, conceal and carry away Ed Hallmark, an individual, with intent to hold and detain, and who did hold and detain said Ed Hallmark, with intent and for the purpose of committing robbery." [See Clk. Tr. p. 7.]

At the time defendant committed the acts, as alleged above and at the time when the charging words were written, there was no such crime separate from robbery, in the State of California, as holding or detaining a person for the purpose of robbery.

Prior to 1951, holding or detaining a person for the purpose of robbery was a crime. But in 1951 the Legislature deleted the words for the purpose of robbery from the statute and put in a new sentence to cover that purported offense. This new sentence reads as follows:

> ". . . Any person who kidnaps or carries away any individual to commit robbery."

Upon the trial the jury was instructed under the old law that the holding or detention of a victim during a robbery would sustain a conviction. These instructions were clearly erroneous and improperly advised the jury to find the defendant guilty for acts which were not then a crime. [Clk. Tr. pp. 43-45.] The defendant was found guilty by the jury on Count I and Count II. He was sentenced on Count I for the term prescribed by law, which carries an indeterminate sentence of five years to life. He was sentenced on Count II to life imprisonment *without* possibility of parole, as is provided in Section 209, when bodily harm occurs to the person.

Counsel at the trial, did not urge the void nature of the information nor did he urge the erroneous and prejudicial nature of the instructions at the trial. The case was appealed and upon appeal before the District Court of Appeal, District Two, Division One, was affirmed. On this appeal, counsel did not refer to the fact that the charging words of the information charged an offense which was not then a crime separate and distinct from robbery in the State of California. Counsel did urge that the instructions were erroneous—not that they were erroneous *per se* as authorizing a conviction for innocent acts, but rather that they were not warranted under the evidence. The court affirmed the conviction. The petition for rehearing, addressed to the same court was denied, and a petition to the Supreme Court of the State of California was denied. In the opinion of the District Court of Appeal, District 2, Division One, affirming the conviction, the court (1) quoted the law in the opinion as it existed prior to amendment, and (2) the court further stated that the instructions were not erroneous, and that no prejudicial error occurred.

Thereafter, a motion to recall the remittitur was presented to the District Court of Appeal of the State of California, District Two, Division One. In this motion, it was pointed out to the court that the information charged the defendant with the commission of acts in Count II which were not, at the time the acts were committed, a crime in the State of California, distinct from the crime of robbery which had been charged in Count I. That the judgment as to said count was void, based upon mistake of fact, false suggestion innocently made and acted upon by the court by inadvertence.

It was also pointed out to the court that the erroneous nature of the instructions authorized the jury to bring back a guilty verdict for the commission of acts that were not a crime in the State of California, separate from the crime charged in Count I. The District Court of Appeal, after hearing, determined that the petition to recall the remittitur should be granted as to Count II because:

> "It appearing from the record that the opinion of this court, filed March 29, 1955, affirming a conviction of 'life imprisonment without possibility of parole' for the crime of kidnapping 'with intent and for the purpose of committing robbery,' under §209 of the Penal Code was erroneously predicated upon said statute, as it existed prior to 1951, prior to defendant's alleged criminal acts, in which year it was amended, whereas said statute as amended in 1951, does not make it an offense separate from robbery, to hold or detain a person for the purpose of committing robbery, good cause appearing, it is ordered that Appellant's motion to recall the remittitur as to Count II, is granted and it is ordered that the judgment heretofore entered (on March 29,

1955) as to Count II is vacated and set aside and the remittitur issued thereon (April 29, 1955) is recalled."

A petition for rehearing by the People of the State of California was denied. A petition for hearing in the Supreme Court of the State of California was denied. Thereafter, the District Court of Appeal, District Two, Division One, reversed the conviction of petitioner as to Count II. (145 A. C. A., at pp. 135-136 (cited in appendix).)

From this judgment and opinion, the People of the State of California, through the Attorney General's office did petition for a rehearing, which was denied. They thereafter did petition the Supreme Court of the State of California for a hearing which was granted. The Supreme Court of the State of California, in an opinion on April 30, 1957, did decide the District Court of Appeal based its recall for the remittitur upon error of law and that it was without jurisdiction to recall a remittitur for an error of law so that it should have vacated its order recalling the remittitur and not redecided the case on its merits. Accordingly, the Court ordered the District Court of Appeal to file an order vacating its order recalling the remittitur and to reissue the remittitur on its decision affirming the judgment.

Petitioner has been put to trial, found guilty, and has been sentenced for acts which were not a crime separate from the crime for which he was separately charged, convicted and sentenced. Thus, the State of California, acted through the District Court of Appeal, three judges sitting, has stated that this defendant has been charged, sentenced, convicted, and stands imprisoned for life

without possibility of parole for acts which were not then a crime separate and distinct from the crime for which he was charged, sentenced and convicted in Count I. These three judges went on record, in formal opinions, in stating on two different occasions that they erroneously predicated a prior affirmance of the conviction and the sentence of petitioner upon the law that preexisted his acts, his charge, his trial and his sentence. Thus the State of California, acting through the District Court of Appeal, three judges sitting, has said this defendant has been wrongfully convicted and is in prison without possibility of parole by virtue of error of the State of California itself, to wit, their own inadvertent overlooking of the new law, for acts that were not a crime separate from robbery, at the time he did them.

However, with that posture of the case, the Supreme Court of the State of California has held that, though this be true, he shall stand deprived of his liberty. Thus, the Supreme Court of the State of California directly ignores the presumption of judicial legality, the preexisting rules regarding the granting of a motion to recall a remittitur, the statement of the error by the three judges of the District Court of Appeal, and their finding of the illegal incarceration of the defendant, and states that the court which thus erred is powerless to correct the situation and orders the District Court of Appeal to reinstate the decision affirming the conviction.

Reasons for Granting the Writ.

I.

A fundamental concept of ordered liberty is that no man shall be incarcerated and deprived of his freedom for acts which have not been declared unlawful by the sovereign power. A further concept is that no man shall be twice punished for the same act.

To those tenets of humanity is the corollary that no man shall not be deprived of his freedom, and no conviction shall be permitted to stand, when that conviction might have had its base upon innocent or non-penal acts.

In *Stromberg v. California*, 283 U. S. 359, at page 368, this court has said:

> ". . . . The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this court, that the state's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to

be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."

See also *Williams v. No. Carolina*, 317 U. S. 287, 292; *Cramer v. United States*, 325 U. S. 1, 36 (note 45); *Yates v. United States*, 77 S. Ct. 1064; *People v. Mitchell*, 92 Cal. 590; *People v. Garett*, 129 Cal. 364, and compare *Cole v. Arkansas*, 333 U. S. 196; *De Jonge v. Oregon*, 299 U. S. 353.

That the very evil aimed at by the above cases has occurred in this case, has been twice, formally and judicially announced by the State of California. (See Opinion of the District Court of Appeal of the State of California granting petition to recall remittitur, and the Opinion reversing the conviction as to Count II, printed in the appendix.)

Such an evil palpably offends due process of law, an ordered concept of liberty and any concept of justice implicit in a sense of fair play.

But in the instant case, the State of California, has gone even further than the above referred to cases. Here, the State of California, in effect has said—yes, your conviction on Count II offends due process of law, is illegal and in manifest contravention of the law, and it occurred because we, the official agents of the State of California, responsible for the affirmation of your conviction, relied and erroneously predicated our decision upon improper and non-existent law. Now, that you have pointed out our error to us, we, the court that erred, proclaim our error and moving to correct it, adjudge the wrongfulness of your conviction.

Thereafter, the same State of California, through its Supreme Court, has taken the position that the three-judge court which erroneously affirmed the conviction of a person for the commission of acts which were not a crime, may not correct itself and ordered that three-judge court to vacate its prior orders and reinstate an order of conviction.

It is petitioner's position that the ambit of an ordered concept of liberty requires that a state, when it has through its own official act confessed error and stated that it has wrongfully imprisoned a person for acts that are not a crime, may not adjudicate itself procedurally helpless to correct its own error and free the wrongfully imprisoned person. We submit that when such an adjudication occurs, state procedure must stand aside in deference to the requirements of due process. (*Moore v. Dempsey*, 261 U. S. 86; *Tumey v. Ohio*, 273 U. S. 510.)

In the instant case a motion to recall the remittitur was addressed to the court which committed the error (see the record). In this petition it was pointed out that under the settled law of California several valid grounds to recall a remittitur then existed. The District Court of Appeal, in its decision, recalling the remittitur, announced that its previous decision had been "erroneously predicated" upon the wrong or non-existing law. This would seem to clearly fall within the legitimate rule of inadvertent or innocent false suggestion acted upon by the court.

Yet the Supreme Court, ignoring the settled principle that a court is presumed to act within its own jurisdiction, stated:

> "The order of the District Court of Appeal . . . shows on its face it was based on an error of law."

The Supreme Court then determined the District Court of Appeal was powerless to admit its error and—apparently to save the judicial face of the State of California—ordered the reinstatement of the opinion affirming the conviction.

The Supreme Court of the State of California, however, did not stop there but went on and by erroneous inference and innuendo necessarily implied a decision which would forever preclude the petitioner from obtaining his release through state processes for a wrongful conviction, as follows:

(1) The Supreme Court implied that the three judges of the District Court of Appeal did not know their own minds when they said they had "erroneously predicated" their decision on the wrong law, for the Supreme Court blithely says, at page 490 of the printed opinion:

> "Moreover, it is clear . . . . that the District Court reviewed the sufficiency of the evidence in the light of the provisions of Penal Code, Section 209, as they read at the time the alleged crime was committed."

(2) The Supreme Court implied that the fact that the information charged Petitioner with a commission of acts which were not then a crime, was immaterial, for it said at page 491 of the printed opinion:

> "An information is sufficient if it charges the defendant with the commission of a public offense in words sufficient to give him notice of the offense of which he is accused."

And

> "Surplusage, however, does not vitiate the information and may be rejected if enough remains to charge the offense."

This language completely overlooks and ignores the fact that the additional words charged the defendant with a commission of acts that were not then a crime. As to this aspect of the case, may we refer the court to the language of *Williams v. No. Carolina*, 317 U. S. 287, at 292:

> "To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights."

(3) The Supreme Court of California implied that though the charging words of the information charged the petitioner with the commission of acts which were not then a crime, and the fact that the jury was instructed that those acts would authorize a conviction, was not important or constitutionally material, for it said at pages 492 and 493 of the printed opinion:

> "The part of the foregoing count that defendant did 'seize, confine, abduct, conceal' and 'who did hold and detain said Ed Hallmark, with intent and for the purpose of committing robbery,' are not chargeable as public offenses under Penal Code, section 209 as amended. If these parts of the count are disregarded as surplusage, however (*People v. Steelik*, supra, 187 Cal. 361, 371), Count II would still charge the offense of kidnaping for the purpose of robbery in violation of section 209 as amended and give defendant ample notice of the offense of which he was accused, ..."

And

> "Defendant's complaint that erroneous instructions were given would not authorize the recall of

the remittitur, for it is a complaint of an error of law and judicial error only, and a remittitur will not be recalled to correct judicial error or mistake of law. Any objection defendant had to the instructions should have been raised on his appeal from the judgment of conviction."

As to these statements, it is clear that the Supreme Court of the State of California misconceives, or is unaware of, the clear principles of the *Stromberg*, *Cramer* and *Williams* cases above cited. It is also clear that the court failed to observe the importance of the fact that the case was tried upon the theory, and the jury was instructed on the theory, that innocent acts would sustain a conviction.

Clearly from the above an inference and an implication is inescapable that the Supreme Court of the State of California is not concerned about the fact that petitioner was charged and tried upon a theory of crime which authorized a conviction for innocent acts and, now stands committed and incarcerated by state confessed error. This, the Supreme Court would seem to imply, is immaterial, surplusage, a due process bagatelle and a judicial peppercorn.

II.

One of the great dangers of state procedure is that often under their thin guise is a latent attempt to evade and avoid the curative power of the Fourteenth Amendment. In this instance, to permit California's own construction and interpretation of the scope and limits of a petition to recall a remittitur to obtain would be to so construe and apply those limits as to offend due process. (*Moore v. Dempsey, supra; Yick Wo v. Hopkins,* 118 U. S. 356.)

III.

The Supreme Court of the State of California, in holding that the District Court of Appeal erred and was powerless to order the recall of the remittitur, denied this petitioner equal protection of the law. The rules providing for the recall of the remittitur have been settled and clear and the Supreme Court has arbitrarily and unreasonably drawn a distinction solely as to petitioner that it is not reasonable in itself.

Conclusion.

For the foregoing reasons, this petition for writ of Certiorari should be granted.

Respectfully submitted,

MORRIS LAVINE and
ERNEST L. GRAVES,
By MORRIS LAVINE,
Attorney for Petitioner.

APPENDIX A.

§209, Penal Code (Prior to 1951):

"Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

* * * * * * * *

§209, Penal Code (as amended in 1951):

"Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying

the same, in cases in which the person or persons subjected to kidnaping suffers or suffer bodily harm shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole. [Am. Stats. 1951, ch. 1749, §1.]"

* * * * * * * * *

CONSTITUTION OF THE UNITED STATES

Amendment 14

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B.

[Crim. No. 5264. Second Dist., Div. One. Mar. 29, 1955.]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA.

The People of the State of California, Plaintiff and Respondent, v. Donald Richard Randazzo, Defendant and Appellant.

Defendant was charged by information with robbery in Count I and in Count II with kidnapping for the purpose of robbery. The jury found defendant guilty on both counts and on the second count recommended life imprisonment without possibility of parole. A motion for a new trial was denied and the appeal is from the judgment and order denying motion for a new trial.

It is contended on appeal that,

"I

"The court erred in receiving the verdicts of the jury in the absence of counsel for the defendant. The receipt of a verdict for an eighteen year old boy in the absence of his counsel, in effect, denied the appellant due process of law guaranteed by the fourteenth amendment to the Constitution of the United States.

"II

"The verdicts are contrary to the the law and the evidence, particularly as to Count Two.

"III

"The defendant was denied due process of law guaranteed by the fourteenth amendment to the Constitution of the United States in the receipt in admission of the alleged confessions including (a) the written confession; (b) the tape recording; (c) the motion picture reenactment.

"IV

"The court erred in its ruling throughout the trial of the case.

"(A)

"The court erred in refusing to compel the recall of Ed Hallmark, the alleged victim in the case, and in refusing to issue and order compulsory processes for that purpose.

"(B)

"The court erred in refusing to permit the defense to read Hallmark's testimony at the preliminary hearing in view of the fact that he was not permitted to be recalled.

"V

"The court erred in instructions given and refused.

"(A)

"The evidence did not support an instruction, or instructions, on the law of kidnapping.

"(B)

"The court erred in giving an instruction that kidnapping for the purpose of robbery may be found after the actual perpetration of a robbery.

"VI

"The court erred in pronouncing judgment in view of the objections to the procedural denial of due process of law under the fourteenth amendment to the Constitution of the United States. The court refused to permit the defendant to cross examine witnesses or to bring Ed Hallmark into court for further proceedings and further testimony.

"VII

"The court erred in pronouncing judgment on both offenses."

The record reveals, as recited in respondent's brief that,

"About 1:00 p.m. on Sunday, September 13, 1953 the appellant picked Joseph Perez up at his home. They went to El Monte and El Sereno, where they picked up three other boys and drove around drinking beer. They let the other three boys off about 10:30. The appellant then asked Perez if he wanted to help him rob a place, and Perez said that he did not want to. The appellant took Perez home and left him there about 11:30. Perez gave him seventy-five cents for taking him home. Then the appellant went away.

"About 2:00 o'clock Monday morning, September 14, 1953, the appellant drove into Ward's Acre Service Station in Alhambra in a Mercury car. Mr. Hallmark, the 73 year old service station attendant on duty, went to the appellant. Mr. Hallmark had a flashlight in his pocket. The appellant said that he wanted some gas and oil. Mr. Hallmark gave him the gas and went to give him the oil. The appellant hit Mr. Hallmark with something on the top and sides of his head. It sickened him and knocked him down. He started to call for help. The appellant got Mr. Hallmark up and pushed him toward the cash box, telling him that he would put a bullet through him if he didn't stop the noise. Mr. Hallmark opened the cash box and the appellant threw his arms around him. Then he hit Mr. Hallmark with something on top of his head. There was blood on his head. Then Mr. Hallmark got another blow and that was the last he remembered until he was in the hospital.

"About 4:30 that morning Joseph Perez's cousin woke him up and told him that the appellant was out-

side. Perez started to put on his clothes, and the appellant walked into the front room. He had on a blue shirt, which Perez had lent him, and gray trousers. They had blood on them. Perez asked what he was doing there so early, and the appellant said that he had robbed Ward's Acre and had brought the old man to Perez's house, where he had put in the bathroom. Perez asked him why he did it, and the appellant said he didn't know. He showed Perez a wallet full of money, which he said he had got from Ward's Acre. Perez told the appellant to take Mr. Hallmark back to Ward's Acre or to a hospital; that he didn't want to get involved in trouble. After Perez had argued with the appellant for about ten minutes, the appellant left, taking Mr. Hallmark with him. Mr. Hallmark had blood on the back of his head and he seemed to be in a daze."

Defendant was arrested on the night of September 22d. A complete confession followed the arrest which was recorded. Defendant was taken to the hospital where the victim stated, "Yes, that is the old man I slugged." Other evidence relating to defendant's guilt need not be detailed.

[1] With regard to the first contention the record reveals that the minutes of the clerk show that,

". . . Counsel for defendant is not present during the return of the verdicts, said counsel having stated to the Clerk by telephone that it was agreeable with counsel that the verdicts be returned in his absence due to his being in the City of Los Angeles and not feeling too well at the time of the return."

No prejudiical error resulted from the incident. (See People v. Bennett, 65 Cal. 267 [3 P. 868]. Also People

v. Wissenfield, 36 Cal. 2d 758 [227 P. 2d 833]; also 53 American Jurisprudence, 708.)

[2] Appellant argues, with regard to the second contention that, "The testimony in this case is that the gasoline station was robbed and not Ed Hallmark. There was nothing taken from his person and the robbery was completed when the money was taken from the cash box. There is nothing shown that his subsequent carrying away, or ride in the automobile, was to commit robbery or that any robbery was committed on him. The testimony of Mr. Hallmark ends with his being struck; he does not know what happened after that time. Whatever occurred comes from the lips of others, but there is no testimony that any robbery occurred thereafter.

> "Under these circumstances, under Section 209, Penal Code, as amended in 1951, the defendant was not guilty of kidnapping to commit robbery.
>
> . . . . . .
>
> "The examination of the evidence shows:
>
> "(1) There was no kidnapping to commit robbery;
>
> "(2) There was no bodily harm in the course of my transportation of Mr. Hallmark.
>
> "It appears that he was transported to take care of him rather than do any bodily harm."

Section 209 of the Penal Code provides that "Every person who seizes, confines, . . . kidnaps or carries away any individual by any means whatsoever with intent to hold or detain or who holds or detains, such individual for ransom, reward or to commit extortion or robbery . . . is guilty of a felony. . . ."

There is no question as to the applicability of the law. The only question was one of fact and as pointed out by respondent,

> "Where a kidnapping takes place after the actual perpetration of a robbery such kidnaping may be a kidnaping for the purposes of robbery it it may reasonably be inferred that the transportation of the victim was to effect the escape of the robber or to remove the victim to another place where he might less easily sound an alarm.
>
> "People v. Kristy, 4 Cal. 2d 504, 507-508 [50 P. 2d 798].
>
> "People v. Raucho, 8 Cal. App. 2d 655, 665-666 [47 P. 2d 1108].
>
> "People v. Bean, 88 Cal. App. 2d 34, 40-41 [198 P. 2d 379]."

That the evidence supports the jury's conclusion that the kidnapping was related to and associated with the robbery, there can be no question.

It would serve no useful purpose to detail the arguments relating to appellant's other contentions. It is sufficient to note that no prejudicial errors were committed by the trial judge. The instructions were not erroneous; due process of law was not denied the defendant. Other contentions are without merit.

Judgment and order affirmed.

J. DORAN

WHITE, *P. J.*, and DRAPEAU, *J.*, concurred.

[Crim. No. 5264. Second Dist., Div. One. July 11, 1956.]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA.

The People of the State of California, Plaintiff and Respondent, v. Donald Richard Randazzo, Defendant and Appellant.

It appearing from the record that the opinion of this court filed March 29, 1955, affirming a conviction of "life imprisonment without possibility of parole" for the crime of kidnapping "with intent and for the purpose of committing robbery," under section 209 of the Penal Code, was erroneously predicated upon said statute as it existed prior to 1951, prior to defendant's alleged criminal acts, in which year it was amended, whereas said statute, as amended in 1951, does not make it an offense separate from robbery, to hold or detain a person for the purpose of committing robbery, good cause appearing, it is ordered that appellant's motion to recall the remittitur as to Count II is granted and it is ordered that the judgment heretofore entered (on March 29, 1955) as to said Count II is vacated and set aside and the remittitur issued thereon (April 29, 1955) is recalled.

The appeal as to said Count II is ordered on calendar August 28, 1956, at 10 a.m., for consideration of an amended petition for rehearing as to the affirmance of the judgment rendered on said Count II.

J. DORAN

WHITE, *P. J.*, and FOURT, *J.*, concurred.

ORDER.

[Crim. No. 5264. Second App. Dist., Div. One. Filed Oct. 16, 1956.]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA.

The People of the State of California, Plaintiff and Respondent, vs. Donald Richard Randazzo, Defendant and Appellant.

By The Court:

It appearing that the opinion of this court, filed March 29, 1955, affirming a conviction of "life imprisonment without possibility of parole" for the crime of kidnapping "with intent and for the purpose of committing robbery," under Section 209 of the Penal Code, was erroneously predicated upon said statute as it existed prior to 1951, and prior to defendant's alleged criminal acts, whereas said statute, as amended in 1951, does not make it an offense separate from robbery, to hold or detain a person for the purpose of committing robbery, and the remittitur in said case having been recalled as to Count II by order of this court filed on July 11, 1956 and the judgment as to Count II having been vacated by said order, and the matter now being submitted for decision,

It Is Hereby Ordered, good cause appearing therefor, that the judgment appealed from, in respect to Count II, is hereby reversed.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK.

The People of the State of California, Plaintiff and Respondent, vs. Donald Richard Randazzo, Defendant and Appellant.

Crim. 5996.

Filed Apr. 30, 1957, William I. Sullivan, Clerk.

Defendant was charged by information in two counts, robbery (Pen. Code, §211) in Count I and kidnaping for the purpose of robbery (Pen. Code, §209) in Count II, and was found by a jury to be guilty on both counts as charged. The conviction was affirmed by the District Court of Appeal, Second Appellate District, Division One, on March 29, 1955. (People v. Randazzo, 132 Cal. App. 2d 20.) A petition for rehearing in the District Court of Appeal was denied, a subsequent petition for hearing in this court was also denied, and the remittitur issued on April 29, 1955.

On May 10, 1956, defendant filed with the District Court of Appeal a "Motion to Recall the Remittitur, Reinstate Appeal, and Consider Supplemental or Amended Petition for Rehearing." This motion was granted as to Count II only and the attorney general's petition for rehearing was denied. The attorney general then petitioned for a hearing in this court. Since the appeal was already set for hearing in the District Court of Appeal, we denied the petition beacuse of our unwillingness to interfere until the District Court of Appeal had come to a final decision.

On October 16, 1956, the District Court of Appeal issued its order reversing the judgment of conviction as to Count II, stating as its basis the same ground that

it had used in granting the motion to recall the remittitur, that "the opinion of this court . . . . affirming a conviction of 'life imprisonment without possibility of parole' for the crime of kidnaping 'with intent and for the purpose of committing robbery,' under Section 209 of the Penal Code, was erroneously predicated upon said statute as it existed prior to 1951, and prior to defendant's alleged criminal acts, whereas said statutes, as amended in 1951, does not make it an offense separate from robbery, to hold or detain a person for the purpose of committing robbery. . . . ." A petition for rehearing in the District Court of Appeal was denied, and the case is now before us after the granting of a petition for hearing in this court.

It is contended at the outset that the order of the District Court of Appeal recalling its remittitur now constitutes a final order reinstating the appeal and that therefore, following the transfer of the cause, this court is precluded from reviewing the order recalling the remittitur and must decide the appeal on the merits. We believe, however, that an order of an appellate court recalling a remittitur and setting the appeal for further hearing is an interlocutory order that does not establish the law of the case for further proceedings therein. In this respect it is analogous to an order of a trial court sustaining or overruling a demurrer to the complaint, which does not become binding on it. (Berri v. Superior Court, 43 Cal. 2d 856, 860, and cases cited.) Although the issues of fraud, mistake, or inadvertence on which the recall of a remittitur depend are distinct from the issues on the merits of the appeal, they are usually so closely related thereto that the court can determine them

only by a review of its decision on the merits. (See, Southwestern Inv. Corp. v. City of L. A., 38 Cal. 2d 623, 628-629; Isenberg v. Sherman, 214 Cal. 722, 732; Davis v. Basalt Rock Co., 114 Cal. App. 2d 300, 304-310; Kohle v. Sinnett, 136 Cal. App. 2d 34, 38-40.) If the court was bound by its tentative decision that a fraud had been perpetrated upon it or that it had been inadvertent or mistaken, it would be foreclosed from the full review of the case implicit in its order for reconsideration. Given the strong policy in favor of finality of appellate judgments after the going down of the remittitur, and the fact that the court must be free to review the grounds of its decision recalling the remittitur properly to dispose of the merits, we conclude that if it determines on further consideration that the remittitur should not have been recalled, it has the power to and must vacate its order of recall instead of redeciding the case on the merits. (See, Southwestern Inv. Corp. v. City of L. A., *supra,* 38 Cal. 2d 623, 626; Chin Ott Wong v. Title Ins. & Trust Co., 91 Cal. App. 2d 1, 3; *Ex parte* Gallagher, 101 Cal. 113, 114.) Accordingly, implicit in the District Court of Appeal's reversal of the judgment herein was its redetermination of the correctness of its recall of the remittitur, and that issue is now before this court by virtue of our order of transfer. In this respect, the fact that we denied a hearing following the order of recall is immaterial, since our denial of hearing constituted only an exercise of our discretionary power to transfer or refuse to transfer a cause to this court that is pending in a District Court of Appeal. (Cal. Const., art. VI, §4c.) Cases holding that an order denying a motion to dismiss an appeal becomes the law of the case (see, George v. Bekins Van

& Storage Co., 33 Cal. 2d 834, 850-851, and cases cited) are not inconsistent with our conclusion herein, for in such cases the issues on the motion and merits respectively are ordinarily distinct and the policy in favor of finality of judgments is not involved. The statement in Municipal Bond Co. v. City of Riverside, 4 Cal. App. 2d 442, 445, that the determination of issues on an order recalling a remittitur becomes the law of the case was not necessary to the decision therein and is disapproved.

The order of the District Court of Appeal granting the motion to recall the remittitur as to Count II, ordering the judgment on that count vacated and the remittitur recalled, shows on its face that it was based on an error of law. It is settled that an error of law does not authorize the recall of a remittitur. (Southwestern Inv. Corp. v. City of L. A., *supra,* 38 Cal. 2d 623, 626, and cases cited.)

Moreover, it is clear from its first opinion that the District Court of Appeal reviewed the sufficiency of the evidence in the light of the provisions of Penal Code section 209 as they read at the time the alleged crime was committed. Thus, both defendant and the attorney general briefed the case with reference to the code section as amended, and the District Court of Appeal quoted defendant's contention that he was not guilty of kidnaping to commit robbery "under Section 209, Penal Code, as amended in 1951," set forth the facts that the victim was kidnaped after the service station was robbed, and quoted with approval the argument in the attorney general's brief that defendant was guilty under section 209 as amended on the ground that

"Where a kidnaping takes place after the actual perpetration of a robbery such kidnaping may be a kidnaping

for the purpose of robbery if it may reasonably be inferred that the transportation of the victim was to affect the escape of the robber or to remove the victim to another place where he might less easily sound an alarm.

"People v. Kristy, 4 Cal. 2d 504, 507-508 [50 P. 2d 798].

"People v. Raucho, 8 Cal. App. 2d 655, 665-666 [47 P. 2d 1108].

"People v. Bean, 88 Cal. App. 2d 34, 40-41 [198 P. 2d 379]."

(132 Cal. App. 2d at p. 24.)

Defendant contends that the judgment of conviction on Count II was void and that he was denied due process of law on the ground that he was convicted of an offense unknown to the law. In support of this contention he urges that the information failed to state a public offense since it was couched in the language of section 209 prior to its amendment in 1951 and that the jury was instructed according to the law prior to the amendment.

At no time during the course of the appeal, in his brief on appeal, or his petitions for rehearing and hearing, did defendant, who was then represented by the same counsel as he is now, make any attack upon the information, nor did he point out any inaccuracy or other impropriety of the instructions that he now complains of. He merely asserted, so far as the instructions on kidnaping for the purpose of robbery were concerned, that none should have been given on that subject on the ground that the evidence would not support a conviction

of that crime. No explanation is offered for his failure to raise these points during the appeal or before the issuance of the remittitur, or for his delay for more than a year after the remittitur issued in seeking to set it aside.

An information is sufficient if it charges the defendant with the commission of a public offense in words sufficient to give him notice of the offense of which he is accused. (People v. Roberts, 40 Cal. 2d 483, 486-487; Pen. Code, §952.) Only the essential elements of the offense need be charged. (People v. Britton, 6 Cal. 2d 1, 5.) Notice of the particular manner, means, place or circumstances of the offense is given, not by detailed pleading, but by the transcript of the evidence before the committing magistrate. (People v. Pierce, 14 Cal. 2d 639, 646.) Surplusage, however, does not vitiate the information and may be rejected if enough remains to charge the offense. (People v. Steelik, 187 Cal. 361, 371; People v. Walton, 70 Cal. App. 2d Supp. 862, 865, and cases cited.)

At the time the crime was committed Penal Code section 209 provided: "Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of

the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

In Count II of the amended information it was charged that "For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in Count I hereof, the said DONALD RICHARD RANDAZZO is accused by the District Attorney of and for the County of Los Angeles, State of California, by this amended information, of the crime of KIDNAPING FOR THE PURPOSE OF ROBBERY, a felony, committed as follows: That the said DONALD RICHARD RANDAZZO on or about the 14th day of September 1953, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously seize, confine, abduct, conceal, kidnap and carry away Ed Hallmark, an individual, with the intent to hold and detain, and who did hold and detain, said Ed Hallmark, with intent and for the purpose of committing robbery.

"That said Ed Hallmark so kidnaped was subjected to and did suffer bodily harm by said DONALD RICHARD RANDAZZO."

The part of the foregoing count that defendant did "seize, confine, abduct, conceal" and "who did hold and detain said Ed Hallmark, with intent and for the purpose of committing robbery," are not chargeable as public offenses under Penal Code section 209 as amended. If these parts of the count are disregarded as surplusage,

however (People v. Steelik, *supra,* 187 Cal. 361, 371), Count II would still charge the offense of kidnaping for the purpose of robbery in violation of section 209 as amended and give defendant ample notice of the offense of which he was accused, for it would then read: ". . . that the said DONALD RICHARD RANDAZZO on or about the 14th day of September, 1953, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously . . . kidnap and carry away Ed Hallmark, an individual, . . . with intent and for the purpose of committing robbery." If the offense was not stated with sufficient clarity to enable defendant to present his defense, he should have demurred on one or more of the grounds set forth in Penal Code section 1004. (People v. Schoeller, 96 Cal. App. 2d 61, 62; People v. Waid, 127 Cal. App. 2d 614, 616-617.)

Defendant's complaint that erroneous instructions were given would not authorize the recall of the remittitur, for it is a complaint of an error of law and judicial error only, and a remittitur will not be recalled to correct judicial error or mistake of law. Any objection defendant had to the instructions should have been raised on his appeal from the judgment of conviction. (People v. Whitton, 112 Cal. App. 2d 328, 332.)

It follows from the foregoing that the District Court of Appeal should have vacated its order recalling the remittitur and not redecided the case on the merits. Since the motion to recall the remittitur was made to the District Court of Appeal, however, the correct disposition after granting the petition for hearing is to return the proceeding to that court with appropriate

directions. (Southwestern Inv. Corp. v. City of L. A., *supra*, 38 Cal. 2d 623, 630.) Accordingly, the cause is transferred to the District Court of Appeal, Second Appellant District, Division One, with directions to file its order vacating its order recalling the remittitur and to reissue the remittitur on its decision affirming the judgment.

TRAYNOR, *J.*

We Concur:
GIBSON, *C. J.*
SCHAUER, *J.*
SPENCE, *J.*

Concurring and Dissenting Opinion.

I concur in the conclusion of the majority that the judgment as to Count II should be affirmed. However, I am convinced that the judgment of affirmance should be rendered by this court and not by the District Court of Appeal upon remand with directions or otherwise; and I agree with the discussion and conclusions of Mr. Justice Carter on this point in his dissenting opinion. I wish to emphasize the confusion which in my opinion the prevailing opinion has injected into the practice and procedure in situations of this sort and that in this respect the opinion is not constitutionally sound.

It is noted that the defendant was charged by information on two counts, robbery in Count I and kidnapping for the purpose of robbery in Count II. He was convicted on both counts and separate sentences were pronounced. On appeal to the District Court of Appeal the judgment as to both counts was affirmed. A petition for rehearing in that court was denied and a petition for hearing in this court was denied. The defendant moved the District Court of Appeal to recall the remittitur as to Count II only on the ground that the judgment on that count was void; that it had been improvidently made upon an innocent false suggestion; that it has been based on a mistake of fact; that it had been made through inadvertence on the part of the court and counsel, and that it had resulted in a miscarriage of justice. The motion was granted and the remittitur was recalled as to Count II. The appeal as to that count was reinstated and was set down for rehearing. The judgment on Count I became final. The Attorney General filed a petition for hearing in this court following

the order recalling the remittitur. That petition was denied. The appeal as to Count II was reconsidered by the District Court of Appeal and the judgment as to that count was reversed. A petition for a hearing as to that judgment was granted and the cause was thereby transferred to this court.

It may not be denied that the District Court of Appeal had jurisdiction to entertain the motion to recall the remittitur. It is also beyond question that the motion was a "cause" as contemplated by the Constitution and was subject to transfer to this court on petition for hearing. This court entertained such a petition and denied it. The power of each court to act in each instance was present and when this court denied the petition for hearing the question of the propriety of the order of recall was settled and became either the law of the case or *res judicata*. Thereafter the appeal as to Count II was before the District Court of Appeal the same as if no judgment had been rendered by that court therein and as if no remittitur had issued. Thereafter that court reversed the judgment based on Count II. When this court granted a hearing the judgment of the District Court of Appeal was thereby set aside and the appeal was pending in this court the same as on original appeal and subject to disposition as such. Whatever occurred in the District Court of Appeal on the motion to recall the remittitur had been finally settled and this court should now determine the appeal on its merits.

If the petition for hearing after the decision of the District Court of Appeal in recalling the remittitur had been granted the disposition of that matter might have

taken the course followed in Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal. 2d 623. But such is not this case. When this court denied the petition to review the order of the District Court of Appeal in recalling the remittitur the question whether the order of recall was rightly or wrongly granted faded from the case and was no longer subject to reconsideration. Notwithstanding that fact the majority now directs the District Court of Appeal to vacate its order recalling the remittitur, to reinstate its original judgment and to affirm the judgment of the trial court.

It should be remembered that this court has no appellate jurisdiction as such over the judgments of the District Courts of Appeal. The method of review is by petition for hearing. In the absence of an order of transfer to this court pursuant thereto, those judgments become final by operation of law. When an order of transfer is entered the appeal is then pending not in the District Court of Appeal but in this court for determination. The majority opinion states that the District Court of Appeal "lost jurisdiction" of the appeal upon the issuance of the remittitur and was without jurisdiction to recall it. That question was inherent in the petition for hearing in this court to set aside the order recalling the remittitur and has long since become final. It is not a matter for review on the appeal from the judgment, which is the only matter now before us.

Further confusion is infused into the law by calling the order of the District Court of Appeal in recalling the remittitur an "interlocutory order." Such an order is one that imports a lack of finality in the disposition of the matter involved. Here the question of the finality

of the order of recall became final and the order can in no sense be deemed "interlocutory." That term has a well known and definite meaning, usually provided for by statute, and has no application to a final disposition of the appeal now before us.

On the merits the record supports the judgment and it should be affirmed by order of this court.

SHENK, *J.*

I Concur:
McCOMB, *J.*

Dissenting Opinion.

I dissent.

The majority opinion is predicated upon the theory that the recall of a remittitur by an appellate court is a mere interlocutory order and is analogous to an order of a trial court sustaining or overruling a demurrer to a complaint. In this connection it cites and relies upon Berri v. Superior Court, 43 Cal. 2d 856, which holds that an order sustaining a demurrer without leave to amend is not a final order and may be changed by the court at any time before judgment is entered in accordance therewith. The holding of the majority in this respect is clearly unsound as it fails to give consideration to the basic problems involved in a proceeding for the recall of a remittitur. It has been repeatedly held that when a remittitur is issued and filed in the court below, the appellate court loses jurisdiction of the cause and thereafter has no power to modify or change its decision or judgment unless and until the remittitur is recalled and its jurisdiction is restored. This court has recently reannounced the rule as to when and upon what conditions a remittitur may be recalled. In Southwestern Inv. Corp. v. City of L. A., 38 Cal. 2d 623, this court stated at page 626: "That a remittitur may be recalled on the reviewing court's own motion, on motion or petition after notice supported by affidavits, or on stipulation setting forth the facts which will justify the granting of the order is now determined by rule. (Rule 25(d), Rules on Appeal; 36 Cal. 2d at p. 22.) The question as to when the facts constitute grounds for the granting of the motion is resolved by the case law. Other than for the correction of clerical errors, the recall may be ordered on the ground of fraud, mistake or inadvertence. The recall may not be granted to correct judicial error." Re-

cent decisions of the District Courts of Appeal are to the same effect (Davis v. Basalt Rock Co., 114 Cal. App. 2d 300; Kohle v. Sinnett, 136 Cal. App. 2d 34). Therefore, having in mind that as a general rule an appellate court cannot exercise any jurisdiction over a cause in which the remittitur has been issued by its order and filed in the court below, and that the office of the remittitur is to return the proceedings which have been brought up by appeal to the court below, and when the remittitur has been duly filed, the proceedings from that time are pending in the trial court and not in the appellate court, and that as to such proceedings it is not competent for the appellate court to make any further order until the remittitur is recalled by it (Kohle v. Sinnett, *supra*), it should be apparent that an order granting a motion for the recall of a remittitur issued by an appellate court is something more than a mere interlocutory order such as an order sustaining or overruling a demurrer. This must be the situation because, until such an order is made, the appellate court is without jurisdiction to act in the case (Chin Ott Wong v. Title Ins. & Trust Co., 91 Cal. App. 2d 1). It must necessarily follow, therefore, that when an order is made by an appellate court recalling a remittitur issued by it, the effect of such order is to restore jurisdiction of the cause in that court. True, it may have erroneously granted such order, but if so, the error would be one committed within the exercise of its jurisdiction, and when such an order becomes final, it is not subject to collateral attack. In this respect, an order made by an appellate court recalling a remittitur is analogous to an order made by such a court denying a motion to dismiss an appeal (George v. Bekins Van & Storage Co., 33 Cal. 2d 834). Either of them may be based on facts outside of the record. Fol-

lowing either the court must make its decision on the merits of the case on appeal.

The majority erroneously assumes that the issues which may be involved on a motion for the recall of a remittitur are usually so closely related to the issues on the merits of the appeal that the court can determine them only by a review of its decision on the merits. There is no basis in either law or fact for this assumption. On the other hand, let us assume that in support of a motion to recall a remittitur issued by a District Court of Appeal the moving party made out a clear case of extrinsic fraud by a showing that he was falsely induced by the adverse party to absent himself from the hearing before the District Court of Appeal and that the adverse party falsely represented to the District Court of Appeal that the moving party waived any right to a decision in his favor by the appellate court and the appellate court acted upon such misrepresentation to the detriment of the moving party who did not learn of the deception and fraud until after the issuance of the remittitur. Assume that upon such showing the District Court of Appeal recalled and set aside its remittitur and this court thereafter denied a petition for hearing of the cause and the order granting the motion to recall and set aside the remittitur became final. Would this court hold in such a case that on petition for hearing after the District Court of Appeal had rendered its decision on the merits that its prior decision recalling and setting aside the remittitur could then be reviewed by this court? I have grave doubt that it would so hold, but under the holding in the majority opinion in this case, the order of an appellate court recalling a remittitur, even in the circumstances above recited, could be set aside by this court at any time *regardless of the period of time which had elapsed since the remittitur was recalled.*

The majority cites and relies upon Southwestern Inv. Corp. v. City of L. A., 38 Cal. 2d 623; Isenberg v. Sherman, 214 Cal. 722; Davis v. Basalt Rock Co., 114 Cal. App. 2d 300; Kohle v. Sinnett, 36 Cal. App. 2d 34. But in none of these cases had the order recalling the remittitur become final as it had in the case at bar; that is, in every one of the last cited cases this court granted a hearing and transferred the cause from the District Court of Appeal to this court before the order made by the District Court of Appeal recalling the remittitur had become final, and this court, therefore, had before it the cause in which the order was made granting the recall. Such being the case, there was no collateral attack upon the order recalling the remittitur as this court had the same power to review the order recalling the remittitur as the District Court of Appeal had when it heard the motion and made the order in the first instance. Such is not the situation here as the record discloses that on July 11, 1956 the District Court of Appeal rendered a decision in which it ordered that the remittitur be recalled. That decision is as follows: "It appearing from the record that the opinion of this court, filed March 29, 1955, affirming a conviction of 'life imprisonment without possibility of parole' for the crime of kidnapping 'with intent and for the purpose of committing robbery,' under section 209 of the Penal Code, was erroneously predicated upon said statute as it existed prior to 1951, prior to defendant's alleged criminal acts, in which year it was amended, whereas said statute, as amended in 1951, does not make it an offense separate from robbery to hold or detain a person for the purpose of committing robbery, good cause appearing, it is ordered that appellant's motion to recall the remittitur as to Count II is granted and it is ordered

broad and includes any and all orders. It is said in *In re* Wells, 174 Cal. 467, 471: "The particular clause involved here is that which gives the supreme court power 'to order any *cause* pending before a district court of appeal to be heard and determined by the supreme court.' The contention is that the matter before the district court was not a 'cause' within the meaning of that word as used in the above-quoted clause of the section.

". . . This provision has always been understood to apply to *all cases, matters, and proceedings of every description.* It has been the unvarying custom of the court in Bank to entertain an application for a hearing of any matter decided in department, *regardless of its nature or character.* The rule has been applied in original proceedings of all kinds, *in motions to dismiss appeals* and other matters, as well as in ordinary cases on appeal. The word 'cause,' in the clause above quoted, was understood to be broad enough to include *everything that could possibly come before the department for decision.*

". . . To describe the decisions subject to this power the word 'cause' was selected. This was the word used in the clause of section 2 giving similar power over the department decisions, which, in that clause, as we have said, has been understood to apply to every matter that could be decided by a department. The familiar rule of construction requires that it be given a similarly *broad* meaning in the new provision, and to include *every* matter decided by a district court of appeal, and operating as a final decision or disposition thereof in that court. It is clear, therefore, that the power to transfer causes from the district court of appeal, to the supreme court, either before or after judgment in the district court of appeal, was intended to have this *all-embracing* application." (Emphasis added.)

From the foregoing discussion in the Wells case it seems clear that a motion to recall a remittitur in a District Court of Appeal is a cause within the purview of the above cited constitutional provision, and, therefore, when the District Court of Appeal rendered its decision on July 11, 1956 in which it "ordered that appellant's motion to recall the remittitur as to Count II is granted and it is ordered that the judgment heretofore entered (on March 29, 1955) as to said Count II is vacated and set aside and the remittitur issued thereon (April 29, 1955) is recalled," it decided a cause pending in that court. Its decision in said cause became final 30 days thereafter (under the former rule) unless an order was made by this court within that time transferring said cause to this court. Since no such order was made by this court, the decision of the District Court of Appeal in said cause became final and, like a decision of that court on a motion to dismiss an appeal, was not thereafter subject to review by this court.

For the reasons above stated, I would reverse the judgment as to Count II of the information.

CARTER, J.